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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 330

ESSO STANDARD OIL COMPANY,
Appellant,

vs.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

STATEMENT OPPOSING JURISDICTION

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CUMMINGS AND CRABTREE,
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Of Counsel.

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IN THE SUPREME COURT OF THE STATE OF TENNESSEE

ESSO STANDARD OIL COMPANY,
Plaintiff-Appellant,

vs.

JAMES CLARENCE EVANS, COMMISSIONER, ETC.,
Defendant-Appellee

STATEMENT BY APPELLEE OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES PURSUANT TO SUPREME COURT RULE 12.

The appellee states the following matters and grounds against the jurisdiction of this Court as asserted by the appellant herein, in its statement of the basis of the appellate jurisdiction, filed herein on the 8th day of August, 1952, as required by Rule 12 of the Supreme Court.

I

Implied Constitutional Immunity

The principle of implied constitutional immunity relied upon by appellant to confer appellate jurisdiction upon this Court is frivolous and unsubstantial, the question having been settled by the Supreme Court of the United States in a number of cases adversely to the contention of appellant here.

The appellant sought to avoid payment of the privilege tax on the storage of gasoline imposed by the State of Ten-

nessee upon the basis that this gasoline was the property of the United States. The Supreme Court of the State of Tennessee in construing the gasoline tax stated that it was "a privilege tax on the engaging in the business of storing gasoline" (Opinion of the Supreme Court, p. 6). As contrasted with this, the Supreme Court of Tennessee held the gasoline inspection fee to be a tax laid upon the commodity itself, the gasoline, as an excise tax (Opinion of the Supreme Court of Tennessee, p. 5). The Supreme Court of Tennessee then held that the inspection fee, being a tax on the commodity itself, which belonged to the United States, would not lie; but the privilege exercised by the appellant, a private corporation, of engaging in the business of storing gasoline was a privilege for which the appellant had to pay the tax.

That the tax levied on the privilege of storing gasoline was a privilege tax exacted for the privilege of engaging in such business, *i.e.*, storage, was recognized by the Supreme Court of the United States in the case of *N. C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 77 L. Ed. 730. The Supreme Court of the State of Tennessee having construed the State Taxing Act, such construction is not subject to review.

Thus the tax in question was not a property tax levied against property belonging to the United States, but was a privilege tax levied against the appellant for engaging in the business of storing gasoline and receiving compensation therefor, regardless of who owned the gasoline. The question has been conclusively settled by the Supreme Court of the United States that the mere fact that the gasoline was the property of the United States, or that the economic burden might pass to the United States, would not give immunity to appellant, a private corporation, from taxation by the State on the privilege of engaging in the business of storage of such gasoline.

Under the rules of law which formerly prevailed; probably the appellant would have been immune from the taxes here sought to be imposed. This is clearly shown by the case of *Panhandle Oil Co.* v. *Mississippi*, 72 L. Ed. 857. There the question involved was whether or not the State of Mississippi could impose a privilege tax on gasoline distributors measured by their gallonage, which gallonage included sales to the United States for the use of the Coast Guard Fleet and the Veterans Hospital. The Supreme Court of the United States speaking through Mr. Justice Butler, held that it was immaterial that the seller and not the purchaser was required to report and make payment to the state, and that since the tax depended upon the number of gallons the effect of the tax was to retard and burden the exertion by the United States of its constitutional powers. Therefore, the tax was invalid. This was upon the theory of the old *M'Culloch* v. *Maryland*, 4 L. Ed. 608. Mr. Justices Holmes, Brandeis, Stone and McReynolds all dissented. In the later case of *Graves* v. *The Texas Co.*, 298 U. S. 393, 80 L. Ed. 1236, the Supreme Court of the United States had before it an Alabama Excise or Privilege Tax levied upon storers of gasoline which accrued at the time of the withdrawal from storage. Some of this gasoline was withdrawn and sold to the United States for the use and performance of governmental functions. Again the Supreme Court of the United States speaking through Mr. Justice Butler, held that the state tax on storing measured by the gallons withdrawn for sale or other use when measured by gasoline withdrawn and sold to the United States infringed the constitutional principle safeguarding the Federal Government from state taxation. Mr. Justices Cardozo and Brandeis dissented.

The first whittling at the rule of the *Graves* and *Panhandle* cases came in the case of *James* v. *Dravo Contracting*

Co., 82 L. Ed. 125, 58 S. Ct. 208, 114 A. L. R. 318. In that case the Dravo Contracting Co. had a contract with the United States to build locks and dams in certain navigable rivers located in West Virginia. West Virginia levied an occupation tax against contractors measured by gross income and sought to include in gross income the amount paid to Dravo by the United States. The Supreme Court of the United States, through Mr. Chief Justice Hughes, held that such was not a direct tax or direct burden on the Federal Government even though the imposition of the tax might increase the cost to the Government, and that, therefore, the tax was valid. With respect to the *Panhandle* case and the *Graves* case the Court held that:

> "These cases have been distinguished and must be deemed to be limited to their particular facts."

Finally, in 1941, in the case of *State of Alabama* v. *King & Boozer*, 314 U. S. 1, 86 L. ed. 3, the Supreme Court of the United States, speaking through Mr. Chief Justice Stone, overruled the Panhandle case and the Graves case. In the King & Boozer case the State of Alabama had a sales tax under which the seller was chargeable, but was required to collect from the buyer a tax for goods sold. King & Boozer had a contract with the United States to build an Army camp. This contract was a cost plus a fixed fee contract. The State of Alabama under its state sales tax sought to require King & Boozer to pay the state sales tax on all materials which they purchased for use in the construction of the camp. The Court, speaking through Mr. Chief Justice Stone, said:

> "Congress has declined to pass legislation immunizing from state taxation contractors under 'cost-plus' contracts for the construction of governmental projects. Consequently, the participants in the present transaction enjoy only such tax immunity as is afforded by the Constitution itself, . . ."

The Court further said:

> "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, this is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right to the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Mississippi and Graves v. Texas Co., supra, we think it no longer tenable."

On the same date the Supreme Court of the United States determined the case of *John C. Curry* v. *United States of America*, 314 U. S. 14; 86 L. ed. 9. In that case the Court had before it an Alabama Use Tax. The tax provided "An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail . . . for storage, use or other consumption in this state at the rate of 2 per cent of the sales price of such property."

Again, it was the situation of contractors building an Army camp for the United States on a cost-plus contract basis. They had purchased roll roofing outside the state and brought into the state where they used the same in the performance of their construction contract with the Government. The Supreme Court of the United States, speaking through Mr. Chief Justice Stone, said that:

> "For the reasons stated at length in the King & Boozer case we think that the contractors, in purchasing and bringing the building material into the state and in appropriating it to their contract with the government, were not agents or instrumentalities of the government; and they are not relieved of the tax,

to which they would otherwise be subject, by reason of the fact that they are government contractors."

Going further, the Court said:

"If the State law lays the tax upon them (the contractors) rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the government, like the individual, only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the King & Boozer case, by concession of the Government and on authority, the constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government."

Thereafter, there seemed to have been some confusion as to whether or not the Supreme Court of the United States intended to overrule the Panhandle case and the Graves case. The Court attempted to lay this question to rest in the case of *Penn. Dairies* v. *Milk Control Commission*, 318 U. S. 261, 63 S. Ct. 617, 87 L. Ed. 748, when the Court said with respect to certain opinions of the Comptroller General:

"All rest on the reasoning of the Panhandle Oil Co. v. Knox, 277 U. S. 218, and like cases, which were overruled in Alabama v. King & Boozer, supra."

Subsequent to the Dravo case, but prior to the decision in the King & Boozer case, the Supreme Court of North Dakota held in the case of *Federal Land Bank* v. *De Rochford*, 69 N. D. 382, 287 N. W. 522, that a tax on the sale of motor vehicle fuel to a Federal Land Bank was valid.

The Mississippi Supreme Court, in 1940, immediately prior to the King & Boozer case, held in the case of *Com-*

press of Union v. *Stone*, 188 Miss. 49, 193 Sou. 329, that a gross income tax applied to receipts from the compressing of cotton for the Commodity Credit Corporation, which was a wholly owned Federal instrumentality, was a valid tax.

In 1943 the Supreme Court of Florida, in the case of *United States* v. *Lee*, 153 Fla. 94, 13 Sou. (2d) 19, held that a privilege tax levied on the vendor of gasoline, which privilege tax applied to the vendor even though the sale of gasoline was to the United States, was a valid tax.

Where the Federal Congress has by specific enactment immunized from state taxation activities in furtherance of one of its instrumentalities, then such immunization is good. Such was the holding of the Supreme Court of the United States in an opinion by Mr. Justice Murphy in the case of *Federal Land Bank* v. *Bismark Lumber Co.*, 314 U. S. 95, 86 L. Ed. 65. The Court, however, in this case did not discuss what would have been the effect of such a tax if Congress had not so immunized the transaction and laid its decisions squarely on the fact that such immunization had been granted by specific Congressional enactment.

In the case at bar there is no claim made of any congressional immunization, the reliance being solely upon implied immunity.

In the case of *Penn. Dairies* v. *Milk Control Commission*, 318 U. S. 261, 87 L. Ed. 748, the Supreme Court of the United States was faced with the question of whether or not the minimum price regulations of the State of Pennsylvania could constitutionally be applied to the sale of milk by a dealer to the United States, the sale being consummated within the territorial limits of the state and in a place subject to its jurisdiction. The Court held, speaking through Mr. Chief Justice Stone, that the Congress could have immunized the government from such state regulation by declaring the same inapplicable to sales to the government, but that in the absence of such immunization by spe-

cific enactment, nondiscriminatory taxation or regulation of a contractor with the government was not invalid even though it imposed an increased economic burden on the government, this on the authority of the King & Boozer and other cases. Going further, the Court had this to say:

> "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself, and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on the citizens of the United States within the states' borders. See Metcalf and Eddy v. Mitchell, supra (296 U. S. 523, 524, 70 L. ed. 392, 393, 46 S. Ct. 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, . . ."

Mr. Justice Douglas wrote a dissenting opinion in which Messrs. Justice Black and Jackson joined, but the dissent in this case was based on the proposition that Congress had indirectly required competitive bidding with respect to the purchase of all supplies and that this, in and of itself, was sufficient immunization by Congress from any minimum price regulation.

In the case of *Mayo* v. *United States*, 319 U. S. 441, 87 L. Ed. 1504, the Supreme Court of the United States was confronted with this situation. The State of Florida had a commercial fertilizer inspection law by the terms of which

every bag of fertilizer had to be inspected and an inspection fee paid before the same could be distributed. The United States Government, under its soil conservation program, purchased fertilizer outside of the State of Florida and put the same into the State of Florida there to be distributed by it as a part of the program. The State of Florida sought to stop the distribution by the United States of the fertilizer which belonged to the United States on the ground that the same was not inspected. The Supreme Court of the United States, speaking through Mr. Justice Reed, held that this could not be done because this was *a direct inspection fee charged to the United States Government* for inspecting property belonging to the United States Government. The Court's language was as follows:

> "These inspection fees are laid directly upon the United States. They are money exaction the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the Supremacy Clause. We are not dealing as in Graves v. New York, supra, with a tax upon the salary of an employee, or as in Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, with a tax upon the purchases of a supplier, or as in Penn. Dairies v. Milk Control Commission, No. 399, October Term, 1942, decided March 1, 1943 (318 U. S. 261, ante, 78, 63 S. Ct. 617), with price control exercised over a contractor with the United States. In these cases the exaction directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the Post Office or upon the privilege of selling United States bonds through Federal officials."

The distinction between the case of *Mayo* v. *United States* and the case at bar is clear. If Tennessee sought to tax the gasoline which was stored, the tax would be invalid. In like

manner, if the United States was storing the gasoline in its own tanks, the tax would be invalid; but in this case the tax is on appellant for the privilege of storing the gasoline.

The Supreme Court of the State of Tennessee recognized this distinction when it refused to permit the exaction of an inspection fee because the same was a direct tax upon the commodity, as contrasted with the privilege tax on appellant for exercising the privilege of storing gasoline.

The distinction is borne out by the Supreme Court of the United States in the case of *United States* v. *Allegheny County*, 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209. In the *County of Allegheny* case Mesta Machine Company, located just out of Pittsburgh in Allegheny County, had a contract with the United States Government to manufacture big guns for ordnance. The United States Goverment owned certain of the machinery used in the manufacture. Allegheny County sought, under its property tax, *an ad valorem tax*, to tax to Mesta Machine the value of the machines owned by the United States. The Supreme Court of the United States, speaking through Mr. Justice Jackson, held, first, that the title to the property in question was in the United States and is effective for tax purposes. After making this holding, it found that the assessment against Mesta for the ad valorem property tax was increased, based upon the value of the machinery owned by the United States. The Court held that the ad valorem tax was not a form of personal taxation "*but rather as a tax against the property as a thing*". The Supreme Court of the United States' complete description of the transaction and its holding is contained in the following language:

> "The assessors made no claim that the temporary presence of the Government's machinery actually enhanced the market value or the use value of Mesta's land. The assessors simply and forthrightly valued Mesta's land as land, and the Government's machines

as machinery, and added the latter to the former. We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply for county, city, borough, town, township, school, and poor purposes.

"We hold that the substance of this proceeding is to lay an ad valorem general property tax on property owned by the United States."

In the case of *Smith* v. *Davis*, 323 U. S. 11, 89 L. Ed. 107, contractors with the United States Government sought to exclude from their assessment for ad valorem purposes the amount of an open account claim against the United States Government. The Supreme Court of the United States held that, of course, this was improper and that the ad valorem tax applied. The Court said:

"That this asset involves a claim against the Federal Government is no more fatal to the validity of the tax than the fact that in James v. Dravo Contracting Co. (Citation) the tax was levied on the contractor's gross receipts from the United States or the fact that in Alabama v. King & Boozer (Citation) the sale tax was placed on the sale of property to a contractor for use in a Federal project. *The assets of an independent contractor that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned.*" (Emphasis ours.)

The clearest case on the point involved here is the case of *Wilson* v. *Cook*, 327 U. S. 474, 90 L. Ed. 793, where the Supreme Court of the United States was confronted with the question of whether or not a privilege tax upon each person engaged in the business of severing from the soil for commercial purposes natural resources, including timber, was applicable to contractors severing timber belonging to

the United States from land belonging to the United States within the State of Arkansas where title to the timber remains in the United States until the same had been paid for after being severed.

The statute had a further provision in it to the effect that the severer was required to collect the tax from the owner of the timber at the time of severance and gave the state a lien on the land from which the lumber was severed. With respect to the tax itself, the Court held:

> "Our decision in James v. Dravo Contracting Co. (Citation) and in Alabama v. King & Boozer (Citation) and the cases cited in these opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, *who are taxed by the state on their activities in severing lumber from government lands* under contract with the government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state." (Emphasis ours.)

With respect to the additional questions concerning the lien, the Court held that this had not been correctly raised in the State Court and was not properly before it and that, therefore, it could not make any determination respecting this question.

In the recent case of *Oklahoma Tax Commission* v. *Texas Co.*, and *Oklahoma Tax Commission* v. *Magnolia Petroleum Co.*, 336 U. S. 342, 69 S. Ct. 561, 93 L. Ed. 721, the Supreme Court had before it an Oklahoma Statute imposing two taxes upon the production of petroleum within the State, one a tax on the gross value of production in lieu of all other local ad valorem property taxes and another an excise tax on every barrel of petroleum produced. The Oklahoma Tax Commission assessed both taxes against lessees of mineral rights in allotted and restricted Indian lands. The State Supreme Court of Oklahoma, feeling itself bound by former

decisions of the United States Supreme Court, held the assessments to be invalid on the ground that the lessee was an instrumentality of the Federal Government. In an opinion by Mr. Justice Rutledge the Supreme Court reviewed the change in theory on the doctrine of governmental immunity, quoting the provision from the *King & Boozer* case, as follows:

> ". . . The Constitution, unaided by Congressional legislation . . . (does not prohibit) a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory State tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity."

Mr. Justice Rutledge, in speaking of a previous decision on which the Texas Company relied, said:

> "Since that decision, as we have noted, the process has been reversed in direction. True inter-governmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption."

A recent District Court case on the subject is the case of *Broadhead* v. *Borthwick*, 174 F. (2d) 21, certiorari to the Supreme Court of the United States denied October 17, 1949, 338 U. S. 847, 70 S. Ct. 87, 94 L. Ed. 518. In that case,

under the Hawaii General Excise Tax Act, an excise tax was imposed on every person engaged in the business of selling any tangible personal property. These excise taxes were imposed upon Broadhead on sales made by Broadhead to Army Post Exchanges and Naval Ship Stores. The Federal District Court, in sustaining the Supreme Court of Hawaii's decision upholding the General Excise Tax as involved here, held:

> "It is clear that before 1942 or before any of the instant taxes accrued, as well as also later, the United States Supreme Court had in a series of decisions overruled the ban previously promulgated by the Panhandle case. See James v. Dravo Contracting Co. (Citation), State of Alabama v. King & Boozer (Citation), Curry v. United States (Citation), Penn. Dairies v. Milk Control Commission (Citation); in which last opinion in 1943 the Supreme Court definitely states that the Panhandle doctrine was overruled by State of Alabama v. King & Boozer, 1941, supra."

The question of the extension of the doctrine of governmental immunity to a private contractor from taxes levied against it simply because it is engaged in a contract with the United States, having been conclusively settled in a number of cases, the asserted Federal question is frivolous and not substantial so that there is no jurisdiction for a hearing of the appeal in this case.

Patterson v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 59 S. Ct. 259, 83 L. ed. 231;

Seaboard Air Line R. Co. v. *Watson*, 287 U. S. 86, 53 S. Ct. 32, 77 L. ed. 180;

Deming v. *Carlisle Packing Co.*, 226 U. S. 102, 33 S. Ct. 80, 57 L. ed. 140.

II

The Fourteenth Amendment

The assertion that the equal protection clause of the Fourteenth Amendment was violated is insufficient to confer jurisdiction upon this Court for two reasons: In the first place, this question was not properly raised in the State Court nor decided by it; and in the second place, it is clearly a frivolous and unsubstantial assertion.

This assertion was first raised by appellant on a petition to rehear after the decision of the Chancellor had been affirmed by the Supreme Court of the State of Tennessee. It is based upon the premise that the Supreme Court of the State of Tennessee in the case of *Tennessee Oil Company* v. *Commissioner*, 178 Tenn. (14 Beeler) 683, 162 S. W. (2d) 1081, app. dis. 63 S. Ct. 34, 317 U. S. 588, 87 L. Ed. 482, determined that there was no liability for a tax, whereas, in the instant case it determined there was liability.

The Supreme Court of the State of Tennessee in the case of *Tennessee Oil Company* v. *Commissioner*, supra, expressly held that it would not consider a federal constitutional question raised for the first time in the litigation on a petition to rehear, and has consistently followed such ruling, excepting where the question is raised on the Court's own motion. As a result of this well established Tennessee procedural rule, the Supreme Court of the United States sustained the motion to dismiss the appeal in the *Tennessee Oil Company* v. *Commissioner* case "for want of a properly presented Federal question". (317 U. S. 588, 63 S. Ct. 34, 87 L. Ed. 482)

In like manner the Supreme Court of the United States has held that an attempt to raise a Federal question in a State Court upon a petition for rehearing does not furnish a basis of review by the Supreme Court of the United States,

unless the State Court actually entertains the question and decides it.

(*Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 40 S. Ct. 1116, 64 L. Ed. 213.)

In the case at bar the State Court did not entertain the question and did not decide it and had, as above pointed out, previously held that it would not entertain such question raised for the first time on a petition to rehear.

In addition, as pointed by the Supreme Court of Tennessee in construing its own opinion in the case of *Tennessee Oil Company* v. *Commissioner*, that case was clearly distinguishable from the instant, that is, on the facts. The Supreme Court of Tennessee pointed out that Tennessee Oil Company was there storing gasoline as an agent or servant of the Board of Education, an exempt agency, and that the legal effect was that the Board of Education, the exempt agency, was storing gasoline in its own tank. The Supreme Court of Tennessee in construing the State Act and the factual situations involved found that in one instance the Tennessee Oil Company was not exercising the privilege taxed by the State Taxing Act under its terms, but that in another case, the instant case, on entirely different and distinguishable facts appellant was exercising the privilege and was subject to the taxing act.

This was clearly a matter to be determined by the State Court in construing the laws of the State as applied to different factual situations and the attempt by appellant to impute to the Supreme Court of Tennessee a purpose to afford unequal protection of the laws is frivolous and without merit.

An argument that because one who is found by the Court not to be exercising the privilege taxed, is not taxed, and another who is found to be exercising the privilege taxed, is taxed, equal protection of the laws is not afforded is

spurious, frivolous, unsubstantial and certainly not the foundation for review by the Supreme Court of the United States.

Respectfully submitted,

Dated August 14, 1952.

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